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IN THE

Supreme Court of the United States

October Term, 1962

No. 980

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION
EAL CHAPTER, AFL-CIO,

Petitioner,

—v.—

EASTERN AIR LINES, INC. and
AIR LINE PILOTS ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT EASTERN AIR LINES IN OPPOSITION

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Opinions Below

The opinion of the court below (Pet. App. 1a-6a) is reported at 311 F.2d 745. The opinion of the District Court (Appendix, *infra*, pp. 1a-10a) is not officially reported[1] but has been reported unofficially at 51 LRRM 2105.

Jurisdiction

The judgment of the court below was entered on January 4, 1963. The petition was filed on April 3, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

[1] Petitioner erroneously cites (Pet. 1) the official report of the related decision by Judge Feinberg, discussed hereinafter.

Question Presented

Beginning in 1958, petitioner and respondent Air Line Pilots Association (ALPA) had each conducted a series of strikes against respondent Eastern Air Lines (Eastern) over what has come to be known as the "crew complement" issue. In establishing crew qualifications for the cockpits of jet airplanes, Eastern had offered the flight engineer pilot training so as to give its flight engineers security in the job while meeting in part ALPA's demand for pilot-trained men in all cockpit positions. This proposal was not acceptable to either union. Petitioner insisted that its members not be given pilot training and that the A & P (ground mechanics-type) license be continued as a qualification for the third position in the cockpit. ALPA insisted, on the other hand, that every man in the cockpit should be a pilot represented by ALPA, and that one of them should have the flight engineer's certificate required by the Federal Aviation Agency.

Almost a month after the commencement (June 23, 1962) of petitioner's latest strike over the crew complement and A & P issues, and after the procedures of the Railway Labor Act had been exhausted on those issues and an impasse had been reached, Eastern eliminated the A & P license requirement and required flight engineers to take pilot training to become "pilot engineers." Some of the strikers returned to work on these conditions.

Eastern had also offered to train and in fact trained a number of pilots for flight engineer's certificates so that they could qualify as "pilot engineers" or flight engineers and permanently replace strikers who refused to return to work. In this connection, Eastern and ALPA negotiated three agreements. Petitioner attacks the validity of these agreements on the asserted ground that they relate to flight

engineers and that Eastern was obligated to bargain exclusively with it with respect to the terms and conditions of employment of pilot engineers or flight engineers and had no right to bargain for this purpose in any way with ALPA.

In denying petitioner's motion for a preliminary injunction against the performance of these agreements, the court below held that Congress—by the Railway Labor Act—had excluded the courts from jurisdiction of "[t]he doubtful claims of representation and the jurisdictional controversy" presented by petitioner's motion. The question now sought to be presented is whether the court erred in so holding.

Statement

This is the second petition for certiorari arising out of this same crew complement dispute. The first petition was filed in the case decided by Judge Feinberg, *Flight Engineers' International Association, EAL Chapter, AFL-CIO* v. *Eastern Air Lines, Inc.*, 208 F.Supp. 182 (S.D. N.Y.), *aff'd* 307 F.2d 510 (2d Cir. 1962), and was denied on March 18, 1963 (October Term 1962, No. 776).

While in its present Statement petitioner has chosen to recite the limited certiorari questions presented in the first case (see Pet. 3, 8 fn. 8), it ignores completely Judge Feinberg's "thorough and well reasoned opinion"—upon which the Court of Appeals in that case affirmed—which sets forth a history of the crew complement dispute fundamental to an understanding of the present petition. We shall therefore refer to that opinion as well as to the opinions of both courts below (App., *infra*, 1a-10a;[2] Pet.

[2] We regret that petitioner's failure to comply with Rule 23(i), which required it to append to its petition the District Court's opinion (which it criticizes at Pet. 13, second full paragraph), has made it necessary for us to append that opinion to this brief.

App. 1a-6a) to correct inaccuracies and omissions in petitioner's Statement.

Judge Feinberg's Opinion in the First Case

In *Flight Engineers' International Association, EAL Chapter, AFL-CIO* v. *Eastern Air Lines, Inc., supra,* Judge Feinberg found, *inter alia,* that as between the petitioner and Eastern the "major dispute" procedures of the Railway Labor Act had been exhausted as to crew complement and A & P license issues; that for the preceding year and a half, efforts had been made by the National Mediation Board, a Presidential (Feinsinger) Commission, a Presidential (Kheel) Emergency Board, and various high government officials to resolve the crew complement dispute, but these efforts had failed; that beginning in early June 1962, after petitioner's latest strike notice, petitioner repeatedly rejected mediation and arbitration, even when it was proposed by the President of the United States; that the crew complement and A & P license issues were the "primary cause" of petitioner's strike of June 23, 1962; that two days after the strike began—on June 25, 1962—Eastern offered to settle all issues, including crew complement, on the basis of the just-concluded Trans World Airlines settlement but petitioner rejected the offer and stated, in effect, that it would never give up the A & P license requirement; and that after June 23, 1962 an impasse over crew complement and related issues had been reached.

Based on these findings, which are only briefly sketched above, Judge Feinberg decided that Eastern could lawfully resume operations by changing terms and conditions of employment of flight engineers relating to crew complement and A & P license; that Eastern could lawfully ask

the striking flight engineers to return to work to take pilot training on (modified Feinsinger Commission and Kheel Board) terms that had been previously offered to, and rejected by, petitioner; and, finally, that Eastern, under the circumstances in which it found itself, could train copilots represented by ALPA to take training for a flight engineer's certificate in order to replace the strikers (208 F.Supp. 182 at 185-194).

While Judge Feinberg's order denying petitioner's motion for a preliminary injunction was pending on appeal, petitioner brought this second action against Eastern and made ALPA a codefendant.

The Court of Appeals affirmed Judge Feinberg on his opinion.

The District Court Opinion in This Case

The District Court in this case found, "for the same reasons as did Judge Feinberg," that as between petitioner and Eastern "the procedures of the Act for the settlement of this dispute have been exhausted and that the parties were free to resort to self-help" (App. 8a). It also found "that Eastern has at all times bargained in good faith with [petitioner] and has not conditioned its bargaining on a merger of [petitioner] with ALPA" (App. 9a); and that the petitioner's charge of "a conspiracy" between Eastern and ALPA was "also without merit" (*Ibid.*). Petitioner's failure to append Judge Levet's opinion to the petition (see footnote, p. 3, *supra*) may be accounted for by its unwillingness to deal with these dispositive findings.

Turning to the three agreements of July 20, August 3 and 6, 1962 between Eastern and ALPA which, according to petitioner, relate to matters on which "Eastern was obligated, by the Act as well as by contract, to bargain on only

with EAL Chapter" (Pet. 10), the District Court found that: "These agreements prescribe the procedures under which pilots are to receive training in flight engineer functions and the protection they are to receive as pilots while training and serving as flight engineers" (App. 9a-10a); "These agreements are consistent and necessary to the courses of self-help which Judge Feinberg found lawful • • • I find no violation of [petitioner's] rights in the execution of these agreements" (App. 10a). Accordingly, the District Court denied petitioner's motion for a preliminary injunction on the ground that petitioner had "failed to show by clear and convincing facts that Eastern has violated its legal rights or that it has a reasonable probability of success in a final hearing in this case" (*Ibid.*).

Opinion of the Court of Appeals in This Case

The Court of Appeals observed that petitioner is in this case seeking an injunction to require Eastern "to bargain exclusively with the flight engineers union with respect to the terms of employment of those hired as pilot engineers" and to restrain Eastern and ALPA "from bargaining as to those terms of employment and from giving effect to any agreements between them which concern those terms of employment" (Pet. App. 3a). It found that this "is a dispute as to representation and there are rival claims of jurisdiction" (*Ibid.*). "Both unions claim to represent the employees who are classified as 'pilot-engineers'" (Pet. App. 3a-4a). The Court of Appeals concluded therefore that the District Court was "without jurisdiction to grant the relief" sought by petitioner (Pet. App. 6a).

With respect to the effect of the three agreements between Eastern and ALPA, the Court of Appeals took a view somewhat different from that of the District Court

(see App. 5a-6a, 9a-10a), saying that they regulated both the seniority of the pilots who became pilot engineers and also the terms and conditions of their employment as pilot engineers (Pet. App. 3a).

Under the District Court's express language, Eastern has not bargained with ALPA as to basic terms and conditions of employment of pilot engineers or flight engineers and therefore has not breached any duty to bargain with petitioner. The Court of Appeals held that there is here involved a basic jurisdictional dispute over the exclusive right of one union to represent the pilot engineers or the flight engineers. Under either construction the result reached below was correct, and there can be no basis for granting certiorari.

Reasons for Denying the Writ

The two questions posed by petitioner (Pet. 2) are bottomed on its refusal to acknowledge the correctness of the holding that this case presents "a dispute as to representation" and "rival claims of jurisdiction" (Pet. App. 3a). This precise characterization of the nature of this controversy by the court below is hardly refutable by petitioner's undocumented assertion (e.g., Pet. 11-12) that nothing has really changed in the metamorphosis from a four-man to a three-man crew, which gives rise to the "doubt as to representation" and the "rival jurisdictional claims"—subjects which Congress has entrusted not to the courts but to the "administrative and other processes provided by the Act" (Pet. App. 3a).

In so holding, the court below took a position in accord with the decisions in which this Court has carefully traced the legislative history and pattern of the Act. In the particular factual setting in which that time-tested conclusion is here challenged, there is no problem of general

importance. Nor is there a conflict of decisions. There is, in short, no occasion for further review of the denial of a preliminary injunction sought to force Eastern "to bargain with the flight engineers union rather than the pilots union with respect to the conditions under which these 'pilot-engineers' shall be employed" (Pet. App. 4a).

1. Petitioner now says that no representation dispute exists because it "does not dispute the authority of ALPA to represent the craft or class of pilots; and neither Eastern nor ALPA question that Petitioner is the duly certified representative for flight engineers" (Pet. 22). The quoted statement is correct only so long as it diverts attention from the representational and jurisdictional questions posited by the pilot-engineer position and by the dual seniority (both as pilots and flight engineers) of those pilots who replaced the strikers. Implicit in petitioner's statement is the claim that it is the employees' "true representative" (see Pet. 16) with which the employer has a clear duty to bargain, as in *Virginian Railway* v. *System Federation 40, Railway Employees*, 300 U.S. 515 (1937). But the court below, while fully acknowledging the command of *Virginian Railway* (Pet. App. 3a), found that decision inapposite where, as here, the duty to bargain and the dividing line between the representational rights of two unions have yet to be established under the Act.

Petitioner's attack on the agreements between Eastern and ALPA presupposes that petitioner, and not ALPA, has the exclusive right to bargain with Eastern with respect to the matters covered in those agreements. But their provisions relate to terms and conditions of employment of pilots, as pilots, while they are serving as pilot engineers or flight engineers. And to the extent that any of those provisions might conceivably affect flight engineer jobs,

they result from the recommendations of the Presidential (Feinsinger) Commission, and from the course of self-help found lawful by Judge Feinberg and the Court of Appeals in the first case. In short, these agreements provided the means by which Eastern was able to effectuate the replacement of strikers with pilots and they recorded conditions as they had been lawfully changed by Eastern. But even assuming, *arguendo*, that Eastern did bargain with ALPA over matters within petitioner's alleged representational or jurisdictional province, the controversy is not one for the courts, but for the National Mediation Board.

Thus, in *General Committee* v. *Missouri-Kansas-Texas R. Co.*, 320 U.S. 323 (1943), the Firemen and the Engineers, each of whom represented a separate craft or class, had a dispute over the calling of engineers for emergency service. The Engineers claimed that an agreement entered into between the Firemen and the carriers infringed upon its allegedly exclusive right to represent the engineers; it sought to have the court declare that the agreement violated the Railway Labor Act, and also prayed "that the Engineers should be declared to be the sole representative of the locomotive engineers with the exclusive right to bargain for them" (320 U.S. at 327). Thus, in a situation which the Court of Appeals correctly considered "almost completely analogous" to this one (Pet. App. 4a), this Court held "that the issues tendered by the present litigation are not justiciable" (at p. 327). Petitioner strives (Pet. 16-20) to differentiate the *M.-K.-T.* case from this one. The cases are, however, remarkably similar. Here, as in *M.-K.-T.*, the two unions involved "are the collective bargaining agents for their respective crafts and are acknowledged as such" (320 U.S. at 333). Here, as in *M.-K.-T.*, the employees involved in the dispute have dual seniority (pilot seniority —flight engineer seniority in the case of Eastern; engineer

seniority—fireman seniority in the case of *M.-K.-T.*). Here, as in *M.-K.-T.*, two unions are claiming the right to negotiate with the carrier concerning specific matters having relationship to both classes of employees; that is, it "involves a jurisdictional dispute—an asserted overlapping of the interests of two crafts. It necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority" (320 U.S. at 334-335). Therefore here, as in *M.-K.-T.*, the issue is for the Mediation Board, not the courts.

We refer to the full opinion in *M.-K.-T.* and in *General Committee* v. *Southern Pacific Co.*, 320 U.S. 338 (1943), and *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943). All three cases, read together, give a fully documented account of the Congressional scheme in the Railway Labor Act. And they fully support the decision below.

2. Purporting to see a "conflict" between the decision below and a number of decisions collected at pages 25 to 29 of the petition, the petitioner does not even attempt to show any area of conflict.

The first group of cases cited for this purpose (Pet. 25-26) has consistently upheld federal jurisdiction to compel fair representation of colored workers faced with invidious discrimination by labor unions purporting to represent them. But even in one of that class of cases cited by petitioner, this Court in *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 775 (1952), cautioned the district court that it

> "• • • must bear in mind that *disputed* questions of reclassification of the craft of 'train porters' are com-

mitted by the Railway Labor Act to the National Mediation Board." (Court's emphasis.)

The second group of cases is cited by petitioner (Pet. 27-29) in support of its omnibus request to this Court to "reconcile" them (Pet. 29, last paragraph). In the case cited first, *Brotherhood of Railroad Trainmen* v. *Smith*, 254 F.2d 282 (6th Cir.), *cert. denied*, 356 U.S. 937 (1958), the question posed concerned the validity of a union shop agreement under Section 2, Eleventh (a) of the Act. No disputed questions of representation were there presented. Similarly, in each of the other assertedly conflicting decisions (Pet. 28-29), the validity of the provisions of the challenged contract was not related to the merits of a representation dispute.

Proceeding in like manner, the court below found that petitioner's attack on the validity of some of the provisions of the relevant contracts was predicated upon its disputed and doubtful claim to representation of the pilot-engineer (Pet. App. 3a).

3. In such circumstances, it is clear that the "rights" which petitioner says are obliterated by the decision below (Pet. 2) are the claimed but not yet established "rights" to representation of the pilot-engineer and to jurisdiction over the job he holds and the claimed but undetermined "rights" to represent employees having dual seniority in areas where ALPA also claims jurisdiction. The vindication or rejection of these "rights" rests with the National Mediation Board,[3] notwithstanding petitioner's reluctance

[3] See *UNA Chapter, Flight Engineers' International Association, AFL-CIO* v. *National Mediation Board*, 294 F.2d 905 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 956 (1962), a suit challenging an order of the National Mediation Board in which the Board found that pilots, co-pilots and flight engineers theretofore separately represented by Air Line Pilots Association and Flight Engineers' International Association, respectively, constituted a single "craft or class" for representation purposes under Section 2, Ninth of the Act.

(Pet. 23, first full paragraph) to commit to the Board its representational and jurisdictional claims.

> "The Mediation Board makes no 'order.' And its only ultimate finding of fact is the certificate. *Virginian Ry. Co.* v. *System Federation, supra,* p. 562. The function of the Board under §2, Ninth is more the function of a referee. To this decision of the referee Congress has added a command enforcible by judicial decree. But the 'command' is that 'of the statute, not of the Board.' *Id.,* p. 562." *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, 304 (1943).

Petitioner, therefore, is not "remediless" (see Pet. 20 *et seq.*) before the Mediation Board. It is in precisely the same position as the union parties in *M.-K.-T., supra* where this Court held that the remedy of the unions was to obtain a determination from the Mediation Board. Once the respective areas of authority of the two unions have been established by the Board, petitioner has a complete remedy in the "command" of the statute, "enforcible by judicial decree" as this Court held in the *Switchmen's Union* case.

CONCLUSION

The decision below is correct and there is neither conflict of decision nor any other reason for further review of petitioner's motion for a preliminary injunction. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 19, 1963.

APPENDIX

Opinion by Levet, *D.J.*

(As Reported at 51 LRRM 2105)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

FLIGHT ENGINEER'S INTERNATIONAL ASSOCIATION, EAL CHAPTER, AFL-CIO,

Plaintiff,

—v.—

EASTERN AIR LINES, INC., and AIR LINE PILOTS ASSOCIATION,

Defendants.

On motion by the Flight Engineers Union for a preliminary injunction restraining an airline and Pilots Union from certain alleged violations of Railway Labor Act. Motion denied.

LEVET, *District Judge*:

This case is but another in a series of cases involving the air transportation industry and rival collective bargaining agents of its flight crews. In this case, the plaintiff, Flight Engineers' International Association (hereinafter "FEIA") seeks to enjoin the defendants, Eastern Air Lines, Inc. (hereinafter "Eastern") and Air Line Pilots Association (hereinafter "ALPA") from certain alleged violations of the Railway Labor Act, 44 Stat. 577, 45 USC § 151 et seq. (1958) (hereinafter "Act"). Presently the case

is before the court on the plaintiff's motion for a preliminary injunction.

For the reasons set forth below, the motion is denied.

This entire dispute has a long factual history, only certain portions of which are relevant to an understanding of this case and the dispositions made. Basically the dispute hinges upon the qualifications of the flight crews on jet aircraft which the two rival collective bargaining agents seek to impose upon the air carriers.

Federal regulations require that jet aircraft and four-engine propeller aircraft carry a basic cockpit crew of three airmen, two of whom must be qualified air pilots and one of whom must possess a Flight Engineers' Certificate issued by the Federal Aviation Agency (hereinafter "FAA"). FEIA insists that the carriers must not qualify pilots as flight engineers or require flight engineers to qualify as pilots and that all flight engineers must possess a mechanics certificate, with powerplant and airframe rating ("A & P" license). The ALPA position is that the carriers must give pilots training as flight engineers, that such training is not to include an A&P license, and that if a three-man crew is used on jet aircraft its third member must possess a commercial pilot license and instrument rating and be qualified to relieve the co-pilot under routine and emergency conditions. Colloquially called the crew complement issue, this problem has received nationwide attention and personal consideration by the President and Secretary of Labor.

The facts pertinent to a decision of this motion begin on November 12, 1958, when Eastern and ALPA entered into a "mediation agreement" which provided that any flight crew of more than two must include ". . . a third crew member who has a commercial pilots license . . . in

addition to any other qualifications he may possess." (Complaint, Ex. 1.) However, FEIA refused to accept pilot qualifications for its members and on November 24, 1958 called a strike against Eastern, which continued for 38 days. On December 31, 1958, FEIA and Eastern entered into an agreement terminating the strike. As part of the settlement, Eastern withdrew without prejudice its demand that flight engineers on jet aircraft have minimum pilot qualifications and agreed for a mechanic trained flight engineer with no pilot qualifications. By the terms of this agreement it was to continue in force until April 1, 1960, renewable thereafter on a yearly basis unless notice of a desire to change the agreement was served by either party on the other prior to April 1 of any year, as required by Section 6 of the Railway Labor Act, 45 USC § 156 (1958).

On January 1, 1959, Eastern and ALPA entered into a Memorandum of Understanding which provided for pilot qualifications of the third pilot and for engineer training of such third pilot leading to the procurement of a Flight Engineers' Certificate. (Complaint, Exhibit 2.)

Eastern now found itself on the horns of a dilemma. The government regulations applicable to Eastern's operations require that jet aircraft and four-engine propeller aircraft carry a basic cockpit crew of three airmen, two of whom must be qualified air pilots and one of whom must possess a Flight Engineers' Certificate issued by the FAA. Eastern's December 31, 1958 contract with the plaintiff required that the flight engineer have, in addition to his Flight Engineers' Certificate, an FAA Airframe and Powerplant License. Eastern's agreement with ALPA required that it carry on all jet flights at least three pilots. Accordingly, Eastern carried a basic cockpit crew of four men, one more than required by FAA regulations. Three of the four were pilots represented by ALPA, the other was a flight engineer represented by the plaintiff.

In February 1960 the plaintiff and Eastern exchanged proposed modifications which each desired to make in their December 31, 1958 agreement. In April the parties exchanged similar notices detailing to a greater extent the changes each desired to make in the agreement. After extensive negotiations based on these proposals failed to yield a settlement, Eastern and FEIA in July 1960 resorted to the mediation services of the National Mediation Board. The case was docketed in July and the Board began to mediate the dispute. The Board offered arbitration as to the method to settle this dispute but this was rejected by the plaintiff. Being unable to mediate the dispute, the Board terminated its services on September 5, 1961.

However, before the Board terminated its services regarding Eastern, it had decided on February 6, 1961, in a case involving United Air Lines, that the pilots and flight engineers constituted a single craft or class of employees for the purpose of collective bargaining under Section 2, Ninth of the Act, 45 USC § 152, Ninth (1958). In protest against this decision, FEIA called a strike on February 17, 1961 against Eastern as well as several other airlines, seriously disrupting the operation of the nation's air transportation system. The strike ended shortly thereafter when, upon Secretary of Labor Goldberg's recommendation, President Kennedy established the so-called Feinsinger Commission to make recommendations with respect to a settlement of the dispute over the crew complement problem. All of the parties to this suit participated in the hearings before the Commission. The Commission issued a preliminary report on May 24, 1961, which stated, in part, that both FEIA and ALPA agreed that a jet crew of three men was adequate and that:

> "The most obvious solution to this problem is merger or some form of consolidation [of the two unions].

> In the considered opinion of the Commission, neither peace nor safety on the airlines will be fully assured as long as there are two unions in the cockpit." Feinsinger Comm'n. Report to the President at 42 (1961).

It should be noted here that many of the facts pertinent to a decision on this motion were found by Judge Feinberg of this court in a recent companion case entitled, *Flight Engineers International Association, EAL Chapter, AFL-CIO* v. *Eastern Air Lines, Inc.*, Civil Action No. 62-2586, 50 LRRM 2929 (affirmed per curiam August 30, 1962, Docket No. 27745, 51 LRRM 2038). The record before Judge Feinberg in regard to these facts was similar to that before me and both FEIA and Eastern were parties. Neither of the parties to that case who are parties here deny the accuracy of the facts as found there. Accordingly, I adopt the facts found by Judge Feinberg in that case, specifically, the findings of fact set forth in pages 6 through 13 of that opinion as filed.

Eastern, in implementing its decision to resume operations, met with ALPA during the period of July 20 through August 6, 1962. These meetings resulted in three agreements dated respectively July 20, August 3 and August 6, 1962. (Complaint, Exhibit 6-A.) It is these agreements which are at the heart of plaintiff's present compaint.

These agreements provided the mechanism whereby the striking flight engineers would be replaced by Eastern's own pilots, after these pilots had been trained to acquire a Flight Engineers' Certificate. Specifically the agreements provided that the pilots would be called for training and assignment in the order of seniority; that taking leave of their assignments to take flight engineer's training, they suspended their seniority bidding rights; that their pilot seniority would not be lost or impaired while training as

pilot-engineers; and that there would be no reduction in pay. (Complaint, Exhibit 6-A.)

On August 7-8, 1962, Eastern met with the plaintiff and presented a new "package" proposal. Plaintiff was informed that if that proposal was not accepted, or if a counterproposal was not forthcoming, Eastern would communicate this latest offer to the individual flight engineers as a basis for their return to work on propeller aircraft, they having already been fully and permanently replaced on jets.

Plaintiff rejected this proposal and made no counterproposals. On August 10, 1962, after expiration of the time within which plaintiff was to accept the "package" proposal, Eastern communicated its proposal to the individual flight engineers. All engineers who returned to work on the basis of the offer were reemployed. All vacancies which existed following the return of such flight engineers have been permanently filled by pilots who have bid for or accepted assignments as pilot-engineers or flight engineers. By August 24, 1962 all flight engineers who had not returned to work had been permanently replaced. On August 25, 1962 Eastern sent to all other flight engineers who had not returned to service a letter advising them that because of their failure to return to work pursuant to Eastern's letters of July 18 and August 10, 1962, they had been permanently replaced and ". . . as a consequence, there is now no further need for your service." (Exhibit K, Jarrard affidavit.)

Plaintiff bases its charge of violation of the Railway Labor Act upon the contention that Eastern has negotiated in bad faith with the plaintiff since it has conditioned any settlement of the dispute upon a merger with ALPA (Complaint, Pars. 29 and 35) and that a conspiracy exists between the defendants to oust plaintiff as the collective

bargaining agent of the flight engineers. (Complaint, Par. 37.)

The Railway Labor Act, 45 USC §§ 151-163, 181-188, provides detailed procedures for the settlement of labor disputes arising in industries covered by the Act. (See *American Airlines, Inc.* v. *Air Line Pilots Ass'n, Inter.*, D.C.S.D.N.Y. 1958, 169 F.Supp. 777, 784, 43 LRRM 2390.) This statutory scheme for the settlement of these disputes retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration and conciliation. Any compulsion which does exist under the Act goes only to insure that the procedures outlined in the Act are exhausted before resort can be had to self-help. *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 725, 16 LRRM 749 (1945).

As was stated by the Court of Appeals of this circuit in *Pan American World Airways, Inc.* v. *Flight Eng'rs Ass'n.*, Nos. 27657-58, 50 LRRM 2801, 2 Cir., July 23, 1962 at 2817-18:

> "When the cooling-off procedures of the Act, including the appointment and report of the Emergency Board, if resort is had to that procedure, are exhausted and the final thirty-day period has elapsed it is quite clear that the Act contemplates the further progress toward the determination of the controversy will be left entirely to the interplay of economic forces without further governmental intervention. The parties are then free from all compulsion under the Act and may resort to 'self help.' . . ."

Based on the record before me, I find, for the same reasons as did Judge Feinberg, that as between the plaintiff and Eastern the procedures of the Act for the settlement of this dispute have been exhausted and that the parties were free to resort to self-help.

Plaintiff's contention of bad faith on the part of Eastern is based on the allegation that Eastern conditioned any settlement of the dispute upon a merger of the plaintiff with ALPA. In support of its contentions, plaintiff introduces five affidavits by various flight engineers employed by Eastern. The affidavits of O. N. Roberts, an Eastern flight engineer and Vice-President of the EAL Chapter of plaintiff, describe two meetings with officials of Eastern, one in New York with Malcolm MacIntyre, President of Eastern, and another in Miami, Florida, with A. M. Beverly, a Manager of Eastern. At both meetings, these officials of Eastern urged as a solution to this problem a merger with ALPA. The affidavits of Frank Van Nest and Philip A. Knudsen relate to a conversation they had with Van G. Rowland, Director of Flight Operations for Eastern, while both were walking a picket line in Miami. The gist of the conversation is that the official urged a merger with ALPA and stated that this was the main stumbling block in the negotiations. The affidavit of Melvin O. Pearce relates an incident where a William Whatley, Director of Labor Relations for Eastern, asked him to see if he could not bring FEIA and ALPA together and work out a solution to this dispute by means of a federation or merger.

Eastern counters this allegation by introducing the affidavits of Messrs. MacIntyre, Jarrard, Whatley, Rowland and Beverly. The substance of these affidavits is that each of the officials denies ever conditioning bargaining with FEIA on merger, although they have often suggested merger as the solution to the problem.

It is not strange that Eastern's management suggested merger as the solution, since this has been the solution offered by many disinterested observers and governmental boards. The Feinsinger Commission, for example, pointed out in its report and recommendations at pages 43-44:

> "... Every disinterested observer, governmental or private, who has expressed an opinion to the Commission shares the view that the flight crew should be represented by one union. The Commission firmly endorses such a solution."

This has also been the recommendation of Mr. George Meany and a similar dispute was settled involving Pan American and Trans World Airlines by the creation of Union Merger Groups.

From the record before me, I find that Eastern has at all times bargained in good faith with FEIA and has not conditioned its bargaining on a merger of FEIA with ALPA.

The allegation of a conspiracy between the defendants is also without merit. During the last five years ALPA has struck or threatened to strike Eastern four times over the crew complement issue. These strikes or threatened strikes occurred on October 4, 1958, January 1, 1959, January 1960 and June 1960. Eastern obtained injunctive relief on three of these occasions. The threatened strikes of October 4, 1958 and January 1959 resulted from Eastern's refusal to accede to ALPA's demands which Eastern knew to be offensive to FEIA. Plainly, this history is inconsistent with plaintiff's allegations of conspiracy.

Thus narrowed, the issue becomes whether the agreements of July 20, August 3 and August 6, 1962 support the charge of conspiracy. These agreements prescribe the procedures under which pilots are to receive training in flight engineer functions and the protection they are to receive as pilots while training and serving as flight engineers. These agreements are consistent and necessary to the courses of self-help which Judge Feinberg found lawful. *Flight Engineer's Assn.* v. *Eastern Air Lines, Inc.*,

supra at p. 33. I find no violation of plaintiff's rights in the execution of these agreements.

Based on the record before me on this motion for a preliminary injunction, I find that the plaintiff has failed to show by clear and convincing facts that Eastern has violated its legal rights or that it has a reasonable probability of success in a final hearing in this case. Accordingly, the motion for a preliminary injunction is denied.

The foregoing constitutes my Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

Settle order on notice.

Dated: September 4, 1962